IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

Crl.Rev.Pet.No. 3640 of 2006()

CRRP.60/2004 of ADDL. SESSIONS COURT (ADHOC-III), KASARAGODE
MC.249/2003 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD

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REVN. PETITIONER:

MOIDEEN, S/O. MOHAMMAD,
PANDIVAL HOUSE,
P.O. HEROOR,
MANGALPADY,
KASARAGOD DISTRICT.

BY ADV. SRI.K.V.SOHAN
SRI.K.RAMACHANDRAN (AMICUS CURIAE)

RESPONDENT:

NABEESHA, D/O. MAMMU,
OLAYAM HOUSE,
P.O. SHIRIYA,
KASARAGOD DISTRICT.

BY

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 18/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.R.P.NO. 3640 OF 2006

Dated this the 18th day of December, 2006

ORDER

Can the offer made by a husband that he is willing to maintain his wife on condition that she lives with his parents at the matrimonial home in his absence be reckoned as a sufficient offer under the second proviso to Sec.125(3) or Sec.125(4) or Sec.125(5) of the Cr.P.C. to successfully resist the claim of the wife for maintenance? This is the only question of relevance which comes up for consideration in this Crl.R.P.

2. This is the third tier of litigation and here I shall safely go by the facts as asserted by the petitioner in his evidence. It is his case that he works in a hotel in Mumbai and his wife must reside with his parents and siblings at her matrimonial home in Kasaragod District. He is not present in the matrimonial home and is able to come only annually taking leave from his place of employment. The wife refuses to live with his parents on the plea that she has been subjected to matrimonial cruelty. She made such allegations of cruelty

against the petitioner as well as her in-laws. But in the course of trial, she agreed to live in a separate house away from the matrimonial home if he would provide such a separate residence.

3. The rival contestants examined themselves as P.W.1 and C.P.W.1. No other evidence whatsoever was adduced.

4. The trial court held that the wife is not entitled for separate maintenance, whereas the learned Sessions Judge in revision held that the claimant/wife is entitled for separate maintenance and awarded maintenance at the rate of Rs.1,000/- per mensem to the claimant.

5. Before me, the contention raised at the stage of admission is that the wife is not entitled for separate residence and she is bound to live at the petitioner's parental home. The reasons urged by her to refuse to live in the matrimonial home are not sufficient or reasonable, it is further contended.

6. When this matter came up for admission hearing, this Court entertained a doubt whether the offer made by the husband is one that is legally sufficient and satisfactory. Can a person residing elsewhere insist that his wife must reside with his parents/relatives in his absence and refuse to pay maintenance to her on the ground that such refusal is without

sufficient cause.

7. The question posed calls for precise and correct ascertainment of the scope and sweep of the expression "living with him/her husband" used in the second provisio to Secs.125 (3), 125(4) and 125(5) of the Cr.P.C. I extract these statutory provisions at the very outset.

> **"125. Order for maintenance of wives, children and parents.--**
>
> (1) x x x x x x x x x x x x x
>
> (2) x x x x x x x x x x x x x
>
> (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceedings, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
>
> Provided that no warrant shall be issued for the recovery of any amount due

under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

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(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living

separately by mutual consent, the Magistrate shall cancel the order."

(emphasis supplied)

8. For a correct ascertainment of the scope of the said expression it will be apposite to have a look at the statutory rationale and the legislative purpose behind Sec.125 of the Cr.P.C. To maintain one's children, parents and spouses is undoubtedly the obligation of every civilised human being. Even in the absence of any specific stipulation of law, it must be held to be the natural moral responsibility of every person on this planet to maintain them. Sec.125 of the Cr.P.C, it is trite, is not strictly concerned with this moral responsibility which finds expression in the personal laws applicable to persons. However, the secular society is certainly concerned with maintenance of order, peace and harmony in society and to ensure this, vagrancy has got to be prevented and avoided. The secular provision in Sec.125 of the Cr.P.C. applicable to all Indians is primarily aimed at preventing vagrancy. The moral responsibility can only be the subjective justification of the legislature and the polity for imposing such a legal responsibility.

9. In 1973 the Code of Criminal Procedure underwent drastic changes. Thereafter, the liability under Sec.125 of the Cr.P.C. to pay maintenance has been expanded and it now extends to the liability to maintain one's father and mother also. It will be interesting to have a look at the nature of the responsibility when it refers to parent and child on the one hand and the spouse/wife on the other. To pay maintenance to the husband is still not the legal responsibility of a wife under Sec.125 of the Cr.P.C. It is certainly possible to locate male chauvinist pride or chivalry in such a stipulation absolving a woman of such liability to maintain her husband. While Sec.125 of the Cr.P.C. mandates that the wife, parents and the children must be maintained by a person, it significantly does not insist that all of them should live with the person against whom the claim is made. That obligation is only on the wife. The parent/child is not mulcted by the Code with the liability to live with their child/parent to entitle them to claim maintenance.

10. But not so in the case of a wife. Law appears to have treated the husband – wife relation to be special and peculiar. A husband is entitled to insist that the wife should live with him. Obviously, this is the recognition of the right to conjugal society.

The other responsibility - as a parent/child, stems from the fact of birth, whereas the responsibility to maintain the wife stems from the option exercised by an individual to get married to her. The law is therefore justified in treating the wife differently for the purpose of awarding maintenance and in insisting that the wife must live with her husband if she should claim maintenance from him. Go by theology or sociology, the place of the spouses is together – under the same roof.

11. This right of the husband is seen zealously guarded by Sec.125 of the Cr.P.C. At the time when the claim is staked by the wife, later after the order is passed and still later when the order is sought to be executed, the husband is entitled to contend that the wife is not living with him and that such not living with him is objectionable and without sufficient cause/reason. If so, she forfeits the right to maintenance.

12. Under Sec.125(4) of the Cr.P.C. when the petition is filed, under Sec.125(5) of the Cr.P.C. after the order is passed, and under the second proviso to Sec.125(3) when the order is sought to be executed, the husband is given option to raise and substantiate this plea that the wife is refusing to live with him without sufficient reason. Of course, he has the further option

under Sec.127 of the Cr.P.C. also to seek cancellation of the order granting maintenance passed against him. Wherever he is, he can certainly, in law, make an offer that the wife should live with him before he is called upon to discharge his obligation to maintain her. The wife, of course, has the right to establish sufficient reason to explain her refusal.

13. What does the expression "live with the husband" mean? In plain language and semantics, it can only mean that the couple do reside together under the same roof. The wife is fastened with such an obligation, by law, obviously taking note of the advisability of the spouses living together under the same roof. This cannot, of course, mean that they must be together under the same roof for all the 24 hours of the day or 365 days of the year. A husband in connection with his employment may have to leave the house and may not be available there during the entire day, during some nights or for some length of time to meet particular requirements of his employment or otherwise. Such temporary absence cannot certainly justify the wife contending that she must be permitted to be with him all the time round the clock and round the year.

14. But certainly permanent residence at two different

places cannot be reckoned to be living together. Husbands who permanently reside and work at far off places like places of employment abroad or distant cities in India cannot certainly successfully contend under Sec.125 of the Cr.P.C. that the wife should reside at his parental home or along with his relatives with no prospect of his visiting her and living with her on a permanent or regular basis.

15. The expression “living with the husband” must, in these circumstances, receive a natural, reasonable and fair construction and must oblige the husband to make an offer which would entail the actual living together of the spouses.

16. The concept of marriage and the obligation of the female spouse in matrimony have undergone drastic changes with the advancement of society. No more, can the wife be reckoned as a glorified domestic maid brought into the family after the marriage to look after the parents or siblings. No male chauvinist prerogative in the matter of choice of residence can also be conceded. The marriage must be the harmony of two individuals and infliction of a unilateral and unfair choice on the wife in the matter of post marital residence is certainly anachronistic and incongruent with the changing times and

modern notions of marriage. She must be a partner in that decision also and not merely the subject bound to follow the orders of her "master". The offer must enable the wife to live with the husband and not merely at any place where he will provide for her maintenance. I have no hesitation to hold that at least in the present Kerala context a husband who offers to maintain the wife on condition that she lives at his parental home with no reasonable prospect of his living with her cannot be held to be making a valid offer in terms with the provisions of Sec.125 of the Cr.P.C. I say in the Kerala context because the statutory expressions and provisions have to be interpreted in the societal context and there can be no dispute that higher degree of emancipation has been achieved by the Kerala woman – whether we trace the cause to the matrilineal system which was prevalent predominantly from ancient days, better literacy and education or better assimilation of the progressive norms and attitudes of life.

17. Precedents have been cited before me. Concededly there is no specific precedent throwing light on the precise expression "living with him/the husband" in Sec.125 of the Cr.P.C. Where the husband makes an offer to maintain the wife

on condition that she lives with him, certainly the burden is on the wife to show grounds justifying her insistence on separate residence. A Division Bench of this Court in **A.S.N. Nair v. Sulochana** (1981 KLT 568) has made the position very clear. It is unnecessary to advert to those aspects in any greater detail. The question here is not of sufficient cause or the burden to establish the cause. The question here is whether the offer is one that is legally sufficient and adequate. The sufficiency of the cause can arise for consideration only when an offer which is valid and sufficient in law is made with bona fides.

18. I do, in these circumstances, come to the conclusion that the offer made by a husband like the one in the instant case that the wife should go and reside with his parents and siblings at his parental house in his absence and denies maintenance to her on the ground that she does not so reside, is bound to be visited with an order directing payment of maintenance to his wife.

19. On facts, the offer, even if it be held to be a valid one, was rightly turned down by the wife. She narrated her difficulties at the matrimonial home. The husband's evidence shows that he is permanently at Mumbai and he is unable to

controvert the factual allegations raised by the wife. Of course, she had initially stated that the husband was also cruel. But she had subsequently agreed to live in a separate residence other than the parental home of the husband. This does not certainly entitle the husband to insist that she should reside in his parental home - when the allegations and inconveniences suffered by her at such parental home of the husband, asserted by her on oath, remain without any effective challenge. On that aspect also it will be apposite to refer to the decision of the Madras High Court in **M.Ponnambalam v. Saraswathi** (AIR 1957 MADRAS 693) where the following passage which is extracted later in **Juliet Vasantha v. Antony Marimuthu** (1985 CRI.L.J. 1613) appears:

> "It is now well settled law in England, America and India, that a wife is entitled to insist that she should not be exposed to the unpleasantness of the relatives of her husband and that suitable provisions should be made for her to live with her husband in privacy..... at times the husband may have to choose between his parents, mother or his wife. He must come to his own conclusion in his own

> mind and must not insist upon the incompatible parties like his own wife and mother living together and making life a hell for them..... it cannot be said that the wife had disentitled herself to separate maintenance by saying that she would live only with the husband and not with the step mother added to the bargain..... But times have changed. Hardships which wives were prepared to endure in the past they are not prepared to endure now and the Court cannot impose upon them ante-diluvian requirements of domestic, Hindu house-holds at the present times."

20. There is a plea that the quantum of maintenance awarded is excessive. The court below did not accept the self-serving assertion of the petitioner that he is working at far off Mumbai to earn the meager income of Rs.60/- per day. In any view of the matter, the quantum awarded – Rs.1,000/- per mensem, in the circumstances of this case, cannot be held to be so grossly erroneous or perverse or resulting in any miscarriage of justice as to justify the invocation of the extraordinary inherent jurisdiction available to this Court under Sec.482 of the Cr.P.C.

21. There is a prayer, urged passionately that this revision may at least be admitted and notice may be ordered to the respondent. A serious question is being mooted and therefore the respondent may be heard, it us urged. I am unable to agree. I cannot be unmindful of the travails of a party who gets an unnecessary notice from this Court. The respondent – a woman attempting to avoid destitution seeking the compassion of law (the tangible relief is Rs.1,000/- per mensem) shall not be compelled to endure the trauma of travelling to the seat of the High Court, engaging a counsel and incurring expenditure if that is avoidable and is not essential. It would be myopic to reckon admission of a cause as indulgence of the court or to the Bar. System exists not for the lawyer or the Judge but for the polity – to those who seek justice. Revisions have to earn their place in this Court and cannot lightly walk in. Notices can and need be issued to the respondents only if essential and necessary in law.

22. To help this Court to research the subject as no specific precedent could be located, Sri.K. Ramachandran, a senior counsel de facto, was requested to assist the court. He accepted the request and both counsel after taking time

submitted that no precedent, binding or persuasive on this precise aspect – on the play of the words "living with him/the husband" could be traced.

23. This Crl.R.P. is, in these circumstances, dismissed in limine.

(R. BASANT, JUDGE)

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